

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LISA ROBIN SHIPLEY
Claimant

VS.

HI-LO TABLE MANUFACTURING, INC.
Respondent

AND

AETNA CASUALTY & SURETY CO.
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket Nos. 157,781
& 157,782

ORDER

On April 2, 1996, the Application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Assistant Director Brad E. Avery on December 14, 1995 and an Amended Award entered by Assistant Director Avery on December 15, 1995, came on for oral argument. The Amended Award is identical to the original Award with the exception that the medical records of Dr. David King, Dr. Bruce Silverberg and Dr. Steven Waldman were excluded from the evidence in the Amended Award, having been found to have been admitted in contravention to K.S.A. 44-519 in the original Award.

APPEARANCES

Claimant appeared by and through her attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Edward D. Heath, Jr., of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Kendall Cunningham, appearing for Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Assistant Director, as modified by the Amended Award, is herein adopted by the Appeals Board such that the medical records of Dr. David King, Dr. Bruce Silverberg and Dr. Steven Waldman are not being considered for purpose of this award.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Assistant Director are herein adopted by the Appeals Board.

It should be further noted that the Amended Award of the Assistant Director only lists Docket No. 157,781. During oral argument before the Appeals Board the parties stipulated that the appeal to the Appeals Board was in both Docket Nos. 157,781 and 157,782. These matters were consolidated for the purpose of litigation and decision and the Appeals Board finds per the stipulation of the parties that the Amended Award of the Assistant Director neglected to include Docket No. 157,782 in the heading. The stipulations contained in the Award discuss both docket numbers, both accident dates and average weekly wages for each date. Accordingly, both docket numbers will be considered for purpose of this appeal.

ISSUES

- (1) Whether the Appeals Board can properly consider the medical reports of Dr. David King, Dr. Bruce Silverberg and Dr. Steven Waldman.
- (2) Nature and extent of claimant's injury and/or disability for the dates of accident in question.
- (3) What, if any, is the liability of the Kansas Workers Compensation Fund in Docket No. 157,782?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 44-519 states:

"No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible."

In the deposition of Dr. J. Mark Melhorn, there was discussion regarding the medical reports and opinions of Dr. David King, Dr. Bruce Silverberg and Dr. Steven Waldman. While it is appropriate for Dr. Melhorn to use the reports of other doctors in forming his own opinion, it is clear from K.S.A. 44-519 that the reports and opinions of these doctors cannot be included in the record unless and until their depositions are taken or the parties stipulate their reports into evidence. The timely objection of respondent's attorney at the deposition of Dr. Mark Melhorn to the inclusion of these medical reports triggers the restrictions of K.S.A. 44-519 and these reports cannot be considered.

Claimant suffered injury to her right index finger on December 16, 1989 resulting in an amputation of the finger after long-term conservative care proved unsuccessful. Claimant was returned to her employment and suffered additional injury to her right hand, arm and shoulder on November 5, 1990. Subsequent to these injuries, claimant developed reflex sympathetic dystrophy which, over the course of several years, resulted in claimant's losing the ability to use her upper extremities both on the right and left sides. The

Amended Award of the Assistant Director clearly sets forth in detail the findings of fact and conclusions of law appropriate in this matter. The Appeals Board, in reviewing same, finds no compelling reason to repeat those herein. The findings and conclusions enumerated in the Amended Award are accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein. The Assistant Director accurately identified the medical reports of Dr. Bernard Abrams as the more persuasive medical evidence in this matter. In so finding, the Assistant Director found claimant to be permanently and totally disabled from employment due to the reflex sympathetic dystrophy which had spread throughout both upper extremities. The opinion of Karen Terrill, vocational rehabilitation counselor, in assessing claimant's loss of ability to perform work in the open labor market at 100 percent and her loss of ability to earn comparable wages also at 100 percent, supports the finding that claimant is permanently and totally disabled from employment at this time.

The medical evidence of Dr. Abrams defeats the respondent's contention that some portion of this Award should be borne by the Workers Compensation Fund. The reflex sympathetic dystrophy appears to be related to the original injury suffered by claimant on December 16, 1989 and not to the subsequent temporary exacerbation experienced by claimant on November 5, 1990.

The Appeals Board does acknowledge the Assistant Director awarded claimant temporary total disability benefits in the Amended Award, paragraph No. 3. In finding claimant permanently and totally disabled, claimant is entitled to disability benefits of a permanent nature, not temporary. While this does not affect the monetary award to claimant, it does affect the benefit description and the basis for granting an award.

In all other respects the Amended Award of Assistant Director Avery is affirmed insofar as it is not in contradiction with the findings expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated December 14, 1995 is granted in the favor of the claimant, Lisa Robin Shipley, and against the respondent, Hi-Lo Table Manufacturing, Inc., and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury sustained on December 16, 1989.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lisa Robin Shipley, and against the respondent, Hi-Lo Table Manufacturing, Inc., and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury sustained on December 16, 1989. Claimant is denied compensation for the temporary exacerbation experienced on November 5, 1990.

Claimant is entitled to 103.44 weeks temporary total disability compensation at the rate of \$121.57 per week, totalling \$12,575.20, followed by compensation at the rate of \$121.57 per week or \$112,424.80, with the total award not to exceed \$125,000.00, for a permanent total disability.

As of April 2, 1996, there would be due and owing to claimant 103.44 weeks temporary disability compensation at the rate of \$121.57 per week, totalling \$12,575.20, followed thereafter by 224.99 weeks permanent total disability compensation at the rate of \$121.57 per week, totalling \$27,352.03, for a total due and owing of \$39,927.23, which is ordered paid in one lump sum less any amounts previously paid.

Thereafter, the remaining balance of \$85,072.77 shall be paid at the rate of \$121.57 per week for 699.78 weeks, until fully paid or further order of the Director.

Claimant's contract of employment with her counsel is approved insofar it is not in contravention to K.S.A. 44-536.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical is awarded upon proper application to and approval by the Director of Workers Compensation.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Heather Lohmeyer, CSR Transcript of Regular Hearing	\$150.40
Patricia K. Smith, CSR Deposition of Lisa Shipley Transcript of Regular Hearing	Unknown \$158.80
Hostetler and Associates, Inc. Deposition of Bernard M. Abrams, M.D. Deposition of Bernard M. Abrams, M.D.	\$156.55 \$261.40
Karen Starkey, CSR Transcript of Preliminary Hearing	\$ 84.50
Court Reporting Service Deposition of Karen Crist Terrill	\$139.00
Don K. Smith and Associates Deposition of J. Mark Melhorn, M.D.	\$475.75

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Edward D. Heath, Jr., Wichita, KS
Scott J. Mann, Hutchinson, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director